Schnuck Markets, Inc. *and* Thomas H. Jennings. Case 14–CA–20596

May 31, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, RAUDABAUGH

On December 7, 1990, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Remedy[2] and Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Schnuck Markets, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Frenchette C. Potter, Esq., for the General Counsel.
Dennis G. Collins, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in St. Louis, Missouri, on May 2 and 3, 1990. Subsequent to several extensions in the filing date, briefs were filed by General Counsel and the Respondent. The proceeding is based on a charge filed February 12, 1990,[1] as amended, by Thomas H. Jennings, an individual. The Regional Director's complaint dated March 28, 1990, as amended, alleges that Respondent Schnuck Markets, Inc., of Bridgeton, Missouri, violated Section 8(a)(1) of the National Labor Relations Act by interfering with an employee's grievance filing activities; threatening an employee with demotion and loss of overtime work if the employee continued to assert contractual seniority rights; telling an employee he was being demoted because the employee filed grievances; telling employees to remove dissident union literature from the store bulletin board while permitting the posting of nonunion-related literature; telling an employee he had been demoted because the employee filed a grievance; threatening an employee with unspecified reprisal if the employee continued to discuss union activities with other employees; implying to an employee he could no longer have every Saturday off because the employee filed grievances and engaged in union activity; and maintaining and enforcing the contractual notice posting provision selectively and disparately by prohibiting the posting of dissident internal union literature while permitting the posting of authorized union literature and nonunion-related literature and violated Section 8(a)(3) of the Act by demoting Thomas Jennings from his position of night manager, by failing and refusing to reinstate Jennings to his former position, and by failing and refusing to assign Jennings overtime work as manager on duty on Sundays.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the distribution and sales as a retail grocery store with numerous locations in the St. Louis area, including stores in Ballwin, Missouri, and Butler Hill Road in St. Louis County, Missouri.

[1] In sec. III, A, of his decision, the judge inadvertently used the word ''not'' in the sentence which reads: ''To accept Respondent's argument that Jennings is not a statutory supervisor under these circumstances would be inconsistent with Respondent's own long standing interpretation and application of its bargaining agreement with the Union.'' The Respondent argued that Jennings was a supervisor.

[2] In adopting the judge's recommended remedy, we find that backpay should be computed in the manner prescribed in *Ogle Protection Service*, 149 NLRB 545 (1964), rather than in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), as stated by the judge.

The Respondent excepted, inter alia, to that portion of the remedy requiring it to offer Sunday manager on duty work to Jennings on the basis of his seniority. The Respondent argues that the collective-bargaining agreement is silent as to the manner this work should be assigned and that it has the right, under the bargaining agreement's management-rights clause, to select whomever it desires to serve as the Sunday manager on duty. We note, however, that sec. 14.6 of the collective-bargaining agreement between Schnuck Markets, Inc. and the United Food & Commercial Workers Union Local 6655 provides in pertinent part as follows:

> Work on Sundays and Holidays shall be on a voluntary and rotating basis among qualified employees in the seniority classifications needed. A Sunday and holiday volunteer list will be posted by seniority classification in each store in order to determine those employees who desire Sunday and holiday work. This Sunday and holiday list shall be posted each four (4) week period throughout the year. Employees may add their names to the list at any time. If an employee elects to delete their name from the volunteer list, they will be passed over that particular Sunday or holiday until such time as they volunteer again. When said employee again places their name on the volunteer list, they will be placed on the bottom of the volunteer list and begin to work their way up through the rotation process.

The collective-bargaining agreement thus establishes a system based on seniority for assigning employees to unit jobs on Sunday. The Respondent also observes that the judge referred to a ''correlation'' between the duties of night manager and those of Sunday manager on duty. The Respondent argues therefrom that, just as the night manager is a supervisor, the Sunday manager on duty position should also be considered supervisory. We have affirmed, however, the judge's conclusion that the night manager is not a statutory supervisor. We note also the judge's finding that the Sunday manager on duty bags groceries—a function that, as found by the judge, supervisors are not permitted to perform under the contract.

[1] All following dates will be in 1989 unless otherwise indicated.

It annually derives gross revenues in excess of $500,000, and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Missouri. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the United Food & Commercial Workers Union Local No. 655, chartered by the United Food & Commercial Workers International Union AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As noted, Respondent has various retail grocery stores in the St. Louis metropolitan area, including one of its largest stores at Ballwin, and a store on Butler Hill Road in St. Louis County.

Thomas Jennings has been employed by Respondent for 22 years. In December 1987, Jennings was transferred to the Ballwin store where he worked as a produce clerk until March 1988 when he became night manager. On January 8, 1990, he was demoted to produce clerk but retained the same rate of pay and hours. As night manager Jennings worked 48 hours a week from 10 p.m. until 6 a.m. Monday through Friday nights, plus Sundays as produce clerk at premium pay (1-1/2 times regular pay), until July 1989, when he was told by Store Manager Steve Farigh that he would be limited to 40 hours a week. Jennings then worked Monday through Thursday nights and Sunday in produce (with premium pay). During the past 2 years, Jennings also worked as Sunday manager on duty on two or three occasions.

At all times Jennings was a member of the United Food and Commercial Workers Union, which represents all of Respondent's employees except the meatcutters, deli, and seafood department employees. The current collective-bargaining agreement between the Union and Respondent is effective from June 19, 1988, to June 15, 1991. The agreement, article 1.1, specifically excludes store managers and under article 1.3 provides:

> Under no condition shall supervisors or store managers perform bargaining unit work, except in case of emergency, such as Acts of God or other conditions beyond the control of the Employer, and to the extent that they may perform customer services. Customer services shall not be constructed to including stocking, price marking, truck unloading or building displays, or any other bargaining unit work on a regular basis.

Division Manager Thomas Evett testified that no store managers are in the Union, that all, except possibly one or two comanager positions are held by employees who are union members and that all department managers are union members. The contract refers to the employers appointment of employees to various department head positions such as grocery manager, produce manager, head cashier, and frozen food manager but does not appear to specifically refer to any position of night manager. As pertinent, article 8.13 states that department heads may exercise seniority to displace full-time employees but may not displace another department head and article 11.7 provides that a management leave of absence, with no interruption of seniority, may be granted to an employee accepting a management position.

Otherwise, it appears that Jennings and others with ''manager'' titles (except the store managers) are routinely treated under the contract regarding enforcement of its provisions (for example, through application of seniority rights and the grievance procedure), the same as employees in such classification as clerks.

On December 6, 1989, former employee Nathan Jones told the new Ballwin store manager, Nick Collida, that he planed to file a grievance over having to work nights, that he had spoken to Jennings (who had been a shop steward at two other stores), about filing the grievance, and that Jennings told Jones he probably had a good chance at getting better hours. Collida told Jones that Jennings did not have the right to tell Jones he could file a grievance, and that Jones should come to him before going to the Union about problems.

Several days later on December 11 Jennings went to see Collida about the new schedule which showed that he was not on the Sunday schedule (that allowed him to make an extra $40 a week because of premium pay).

Collida told Jennings it was his responsibility to keep costs down, that Jennings was making too much money to work Sundays, and that Jennings would have to work Monday through Friday nights. Jennings told Collida that the contract allowed him to claim Sunday hours,[2] and that he had always worked Sundays. Collida responded by asked Jennings if he really wanted to be night manager. Jennings replied that he did want to be night manager and would not voluntarily give it up, and if Collida wanted it, he'd have to take it from him. Collida said he would not allow Jennings to work Monday through Friday nights in addition to Sundays and he retained the schedule change that he had made.

On December 18, Jennings filed a grievance over the 8 hours premium pay that was denied him on Sunday, December 17.

On January 8, Union Business Representative Mary Guise, Labor Relations Specialist Maureen Tedoni, District Manager Tom Evett, Store Manager Collida, and Jennings met to discuss the grievance. Tedoni said Respondent was wrong and would give Jennings 4 hours' pay for December 17. Jennings disagreed with how Tedoni computed the hours he missed and said that to settle the grievance he was entitled to 8 hours' more. Tedoni repeated her explanation, said it was a fair settlement, and added that ''a decision has been made to replace you as night manager.'' Jennings asked ''why?'', and Tedoni cited the management-rights clause in the contract. A discussion followed and Evett said they could not keep Jennings on as night manager because he would continue to file grievances over not being allowed to work Sundays. Jennings said it was discriminatory because of his grievance. Evett replied that he was not doing it because of the grievance but to avoid grievance situations and added that he hated grievance meetings, that they were a total waste of time, and that they would find themselves back in the same type of meeting.

On January 15, Jennings was demoted from his position as night manager to a position as a full-time produce clerk.

[2] Art. 7, sec. 1(e) provides, ''daily overtime shall be offered by seniority and job classification within the store among the employees present and qualified to do the work when the need for overtime arises. Scheduled overtime shall be offered by seniority to employees qualified to do the work within the store for the designated time.''

On January 18, the Union filed a grievance on behalf of Jennings over his demotion.

In early January 1990, Jennings and employee Kurt Kausler from the Butler Hill store prepared and distributed letter-size literature addressed to all shop stewards in the St. Louis area regarding an internal union vote on a fee increase scheduled for a January 23 union meeting. The literature prominently identified Local 655 as the subject but was critical of the Union's incumbent leadership and it contained the names and phone numbers of both Kausler and Jennings. No election for union office was involved; however, it did state that the next election would be in November and said the time to get involved is now. Jennings posted this literature at the checker, produce, and grocery timeclocks. Kausler posted one specific notice at the bakery/produce and grocery timeclocks, and in the upstairs lunchroom at his store and also laid the material on the countdown room counter and distributed it among employees during breaks and lunches before and after his shift.

On January 19, Butler Hill Store Manager Tony Gordon told Kausler to remove the literature Kausler had posted and on January 21, Ballwin Manager Collida told Jennings to remove the literature he had posted.

At all times material, Respondent has maintained the following provision in its contract with the Union at article 7, section 10:

> Official notices authorized by the Local Union may be posted on the store bulletin board. They shall not be objectionable in nature.

Otherwise, the Respondent generally allows the posting of such things as marriage and birth announcements, pool parties, bowling parties, retirement parties, showers, thank you notes, and various fund-raising announcements by the time clocks and on the bulletin boards at its stores. It asserts, however, that no ''campaign'' material either political or union, is allowed.

On January 21, when District Manager Evett was visiting the store, Jennings asked to speak with him and said that he felt he should still be night manager. Evett told Jennings that if he had not filed a grievance, he would still be night manager and added that the Company was growing, that opportunities were still there, and that he would be night manager again.

On January 21, Jennings told Ballwin store comanager Steve Wunsch he knew that the literature he had posted had been taken to the comanager's meeting that week. Wunsch said the acting comanager had taken it to the meeting and that Respondent seemed pretty interested in what Jennings was doing and that there was quite a bit of discussion with respect to the literature. Wunsch also told Jennings it would not be taken lightly if Jennings was caught campaigning or talking to employees in the store, whether on the clock or not.

On February 9, Ballwin Produce Manager Skip Cross told Jennings, who now was working as produce clerk, that he had spoken with a union representative the previous day about the grievances Jennings had filed regarding overtime, removal from the night manager position, and other internal union matters. Cross referred to Jennings' running for union office in November and said some people in the store supported Jennings and some did not. He then told Jennings someone outside of the produce department had mentioned that Jennings received every Saturday off (Jennings had selected Saturdays as his day off when he was returned to produce clerk on January 15). Cross said this bothered him once he thought about it and he told Jennings he would start rotating Saturdays among the produce clerks.

On Sunday, February 11, an employee less senior then Jennings was assigned overtime hours as manager on duty. On February 15, February 19, and February 26, respectively, Jennings filed grievances over the loss of overtime hours as Sunday manager on duty. On February 22, District Manager Evett, Labor Relations Specialist Tedoni, Ballwin Store Manager Collida, Business Representatives Guise and Nick Torpea, and Jennings met to discuss the grievance filed by Jennings on February 15. Tedoni told Jennings his grievance was denied because he was not qualified to work as manager on duty because he was no longer a part of management. The employee (Vicki Vogt) who worked as manager on duty on February 11 was not a member of management at that time but was then made an assistant department head. Former employee Rick Russell also worked as Sunday manager on duty while he was employed as a grocery clerk. The shifts available for Sunday manager on duty are 6:30 a.m. to 3:30 p.m. and 3:30 to 10 p.m. Jennings said that while he was night manager, he only infrequently worked as Sunday manager on duty because he usually worked 48 hours per week and did not need any additional hours but that he wished to work as Sunday manager on duty because it became the only overtime available to him after his removal as night manager.

III. DISCUSSION

A. *Supervisory Status*

Inasmuch as the Respondent raised Jennings' purported supervisory status as a defense, the burden of proof rests upon Respondent to establish that status. See *Thayer Dairy Co.*, 233 NLRB 1383 (1977).

Section 2(11) of the Act defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The existence of any one element can be sufficient to convey supervisory status, however, sporadic or occasional exercise of supervisory authority is insufficient to make an employee a supervisor. Also, investiture with a title and theoretical power which may imply supervisory authority likewise is insufficient to transform a rank-and-file employee into a supervisor. See the *Thayer* case, supra, and *Teamsters Local 574*, 259 NLRB 344 (1981), and cases cited therein. Moreover, it is important that authority is actually exercised with the use of independent judgment and that the supervisor be something more than a conduit for managerial directives, see *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

Here, the record shows that Jennings, as night manager, was a senior hourly employee who directed other less experienced employees in the performance of their regular assigned task during the store manager's absence. He is shown to have exercised independent judgment only on sporadic or on an occasional basis, such as when he told an employee who was caught shoplifting not to report to work the next day unless he was called by the manager (the store manager subsequently discharged the employee based on Jennings' report), and when he told an employee of the independent cleaning contractor to leave when he was caught using drugs in the restroom. He did not participate in managerial meetings and his functions were essential to coordinate the night time operations of the store in accordance with management's wishes and, at the same time, to perform certain routine tasks which included filling the cigarette rack and beer cooler and ''conditioning'' the liquor, tasks that took 3 hours each night and tasks which Respondent itself established were performed by Jennings during 30 to 40 percent of his shift.

The record shows that the Respondent gave the title of ''manager'' to a number of employees, including various department managers, however, no such positions, except the top local position of store manager (and possibly one or two comanager positions), are held by persons who are not employee members of the bargaining unit. As noted above, the bargaining agreement specifically provides that ''under no condition shall supervisors . . . perform bargaining unit work . . . including stocking . . . on a regular basis.'' Here, Jennings regularly performed stocking duties 30 or more percent of each shift and the Respondent otherwise treated Jennings as a bargaining unit employee with respect to other provisions of the contract, including wages, seniority rights, and the grievance procedure. To accept Respondent's argument that Jennings is not a statutory supervisor under these circumstances would be inconsistent with Respondent's own longstanding interpretation and application of its bargaining agreement with the Union. Here, there are no compelling indications that the position of night manager is invested with any authority beyond that of a routine nature. All significant authority, including the right to hire, fire, and manage is retained in the store manager. Respondent treats other employees vested with a title as a specific type of manager as bargaining unit employees under its contract with the Union and it is thereby precluded from attempting to avoid its obligations under the Act by suddenly and unilaterally changing its position, a position that clearly shows that employees such as Jennings were not considered to be supervisors.

A finding that a titled ''manager'' is not a statutory supervisor, despite some indication of authority such as an absence of any other supervisory manager, during work hours, is not inconsistent with prior Board decision, compare *Smitty's Foods*, 201 NLRB 283, 286 (1973). Accordingly, I find that Respondent has not shown that Jennings was a supervisor within the meaning of Section 2(11) of the Act at the time of the alleged discrimination against him.

B. *Posting of Literature*

Article 7.10 of the contract between Respondent and the Union provides:

> Official notices authorized by the Local Union may be posted on the store bulletin board. They shall not be objectionable in nature.

Employees Kausler, Menhard, and Hemenway credibly testified that Respondent allows postings of marriages and birth announcements, pool parties, bowling parties, retirement parties, showers, thank you notes, and various fundraising announcements by the timeclocks and on the bulletin boards. Otherwise, the Respondent asserts that in November 1987, it established a policy prohibiting the posting of ''campaign'' materials, whether it be for a union or a political position. In accordance with that policy, store managers were instructed that campaign materials for neither side were to be posted on the bulletin boards, if they inquired during the 1987 union elections and, on occasion the Company has removed some campaign materials.

The letter-size fliers posted by Jennings and Kausler urged employees to vote on an internal union matter and were allegedly viewed to be campaign materials and therefore taken down in accordance with the company's policy. Respondent concedes that given the fact that it has 48 stores with employees who are represented by the Union, it is not inconceivable that isolated incidents of posting of campaign materials in violation of the policy may have occurred. It argues, however, that it has a right to regulate the posting of material where the bulletin boards threaten to become a battle ground for competing groups, citing *Nugent Service*, 207 NLRB 158 (1973).

Employees Jennings, Kausler, Menhard, and Hemenway, each of whom were union shop stewards, actively participated in campaigning at Respondent's stores during November 1987. They openly posted union campaign literature at various stores without opposition or any admonition and they were unaware of a November 4, 1989 memo from management to store managers on this subject.

As noted, Butler Hill Store Manager Gordon told Kausler to remove the dissident union literature on January 19 and on January 21, Ballwin Store Manager Collida told Jennings to remove similar literature that he had posted.

Here, I am not persuaded that the literature in question rises to the level of ''campaign'' material or that anything had occurred to indicate that the request that employees come to vote at the next meeting, not an election, would make it a ''battle ground'' situation. Respondent so called policy was not communicated beyond the level of store manager or comanager and it was not enforced in the past on any apparent significant or uniform basis. Moreover, in Jennings' case it was not enforced until a comanager brought the literature, with Jennings name on it, to the attention of Division Manager Evett at a time when Evett had just recently participated in removing Jennings from his night manager position for what is otherwise found herein to be in violation of the Act.

Under these circumstances, I find that the situation is the same as that considered in *Dresser Industries*, 278 NLRB 819, 823 (1986), and *East Texas Motor Freight*, 262 NLRB 868 (1982), where the Board held that the denial of a dissident union employee's right to post intraunion political literature on company bulletin boards is violative where employees are allowed to use the bulletin boards for other official union business. Accordingly, I find that both by main-

taining and selectively and disparately enforcing the posting provision of the contract and by specifically directing employees Kausler and Jennings to remove such literature, Respondent has violated Section 8(a)(1) of the Act, as alleged.

C. *Other Alleged 8(a)(1) Violations*

I credit the testimony of former employee Jones that when he told Store Manager Collida on December 6 that he had spoken with Jennings about filing a grievance (and Jennings has said he probable could get better hours), Collida said that Jennings did not have the right to tell Jones he could file a grievance, and that Jones should come to him before going to the Union about problems. An employee has the right to file a grievance without discussing the disputed matter with Respondent first. See *Mars Sales & Equipment Co.*, 242 NLRB 1097, 1102 (1979), and accordingly, I find that Respondent is shown to have interfered with an employee's grievance filing activity by telling an employee to come to Respondent prior to filing a grievance in violation of the Section 8(a)(1) of the Act, as alleged.

Five days after the Jones' incident, Collida had a conversation with Jennings in which he questioned the cost of Jennings' working on Sundays. I credit Jennings' testimony that when he defended his schedule under the contract, Collida asked Jennings if he really wanted to be night manager and told him that he would not be allowed to work Monday through Friday nights in addition to Sundays. (Collida gave testimony that was inconsistent with Respondent's documentary records of Jennings' work schedule and, accordingly, I find Collida's denial that he made the night manager remark is untrustworthy). Jennings' schedule then was changed and when this is viewed in context with Jennings' subsequent removal from the night manager position, Collida's statement clearly can be seen as a threat of demotion and loss of overtime work if Jennings continued to assert his contractual seniority rights. See *Industrial Supply Co.*, 289 NLRB 639 (1988). Accordingly, I find that the store manager's statement is a violation of Section 8(a)(1) of the Act, as alleged.

As noted in the factual conclusions set forth above, Jennings filed a grievance of the loss of pay which resulted in the scheduled change which deprived him of working on Sunday, December 17. I agree with the contention of the General Counsel that the testimony of Union Business Agent Guise of what occurred at the grievance meeting on January 8 is entitled to credences, especially since it tends to support Jennings, an apparent Union dissident, rather than the Employer, with which the Union has had a long cooperative relationship. At the meeting, Respondent's Labor Relations Specialist Tedoni acknowledged an error on their part but then disagreed with Jennings' contention of how much pay he was entitled to. She then said that the settlement was fair and added that a decision had been made to replace him as night manager. District Manager Evett than said they could not keep him on as night manager because Jennings would continue to file grievances over not being allowed to work Sundays and that he hated grievance meetings as they were a total waste of time.

Here, I find the substance of the conversation imputes the message that Jennings would be removed from his position because management felt he would file additional grievances to protect his rights that were at odds with management's scheduling plans.

Two weeks later, on January 21, Jennings had occasion to mention the night manager subject when Evett paid a visit to the store. Evett did not testify about that conversation except to answer ''No, I did not say that'' to the direct question by Respondent's counsel which asked if at any time after January 8, he had told Jennings ''that you'd still be night manager if you had not filed the grievance,'' I do not consider Evett's bare denial to be persuasive and otherwise the alleged statement on January 21, is consistent with the statement heard by witness Guise on January 8. Accordingly, I credit Jennings' testimony that Evett told him that he would still be night manager if he had not filed a grievance. On the same day, Store Comanager Wunsch also told Jennings it would not be taken lightly if Jennings was caught campaigning or talking to employees in the store whether on the clock or not. This occurred shortly after Wunsch admittedly had participated in a management meeting wherein he had initiated giving Evett a copy of union meeting literature Jennings had posted and I do not credit Wunsch's denial that he gave Jennings (otherwise described as a friend), the warning recalled by Jennings.

On February 9, Produce Manager Cross said he had talked with a union representative about Jennings' filing of grievances and other union matters and was bothered by Jennings getting every Saturday off and would start rotating Jennings into the Saturday work. Cross exercised apparent authority as Respondent's agent to make schedule assignments and his statements imply that the reasons for changing Jennings' schedule were because of his union activity and/or his filing of grievances. As noted above, the threat, or exercise, of a retaliatory demotion for an employee's grieving under the provisions of a collective-bargaining agreement is improper as is threatening an employee with unspecified reprisal if the employee continues to discuss union activities with other employees. See *Larid Printing*, 264 NLRB 369, 374 (1982). Accordingly, I find that in each instance discussed above, including the partial denial of Saturday as Jennings' day off, Respondent has violated Section 8(a)(1) of the Act, as alleged.

D. *Jennings' Demotion and Work Assignments*

In a discipline case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activity was a motivating factor in the employer's decision to demote or otherwise discipline the employee. Here, the record shows that Jennings' demotion from his night manager position followed his filing of a grievance regarding his work schedule and it was preceded by several actions by the Respondent involving Jennings that violated Section 8(a)(1) of the Act, as discussed above.

This demotion was followed by a denial of Jennings' participation in assignments as Sunday manager in charge. Under these circumstances I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that Jennings protected grievance filing activities were a motivating factor in Respondent's decision to demote or discipline. Accordingly, the testimony will be discussed and the record evaluated in keep-

ing with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1983), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense (other than Jennings' alleged supervisory status), is based on its contention that it made the decision prior to the time Jennings filed his grievance and that it had the managerial right to removel him as night manager because he refused to work the Monday through Friday schedule without claiming overtime. It also asserts that by returning Jennings to the produce clerk position Respondent thereby gave Jennings Sunday hours and allow him to maximize his earnings. This explanation, however, appears to be inconsistent with Respondent's later actions in removing Jennings from his seniority entitlement to assignment as Sunday manager in charge and it is inconsistent with Respondent's illegal threats, discussed above, and with the Respondent's failure to attempt to negotiate a resolution to the problem with the Union as representative of Jennings.

In the face of an obvious conflict between the new scheduling plan advanced by the new store manager and Jennings attempt to exercise the seniority (and grievance) provisions of the bargaining agreement, the employer first admitted to Jennings' seniority rights and agreed to a payment of 4 hours and then abruptly told Jennings' he was being removed as night manager, after he pursued a contention that proper settlement of the grievance entitled him to 8 hours' additional pay.[3]

While it is probable that Respondent could have discussed the prospect of removing Jennings from his night manager's position prior to the grievance meeting in January, as a possible solution to the matter, I do not credit Evett's testimony that the decision had previously been made nor do I credit his denials regarding statements that indicated Jennings' removal was related to his grievance. To the contrary, witness Guise corroborated Jennings' testimony in this regard and the sequence of events clearly supports an inference that Labor Relations Specialist Tedoni exercise an option to remove Jennings after he failed to accept her settlement offer and that this decision was then endorsed by Evett who specifically related this solution to the problem to Jennings' filing of grievances on the matter.

There is no indication that management made any sort of communication to anyone about its alleged decision to remove Jennings until after the grievance settlement offer was questioned by Jennings and, under these circumstances, I find that Respondent has not shown that Jennings would have been removed from his position on January 8, were it not for his protected activity in pursuing a grievance and his seniority rights under the applicable collective-bargaining agreement.

The record also shows that on Sunday, February 11, and thereafter, a less senior employee was assigned overtime hours as manager on duty and Jennings filed grievances over the loss of overtime hours. On February 22, Labor Relations Specialist Tedoni told Jennings his grievance on February 15 was denied because he was not qualified to work as manager on duty because he was no longer a part of management. Employee Vicki Vogt, who worked as manager on duty on February 11, did not hold a manager's position at that time (but has since been made a manager). Otherwise, the record shows that former employee Russell also worked as Sunday manager on duty while he was a grocery clerk and the testimony shows that the duties performed were similar to those of a night manager, including bagging groceries, duties not allowed to be performed by supervisors under the contract and they did not have the authority to hire, fire or promote employees. Under these circumstances, I agree with the General Counsel's contention that Respondent's refusal to assign such work to Jennings is an outgrowth of Respondent's removal of Jennings from the night manager position. It otherwise appears that Respondent in fact has assigned persons who did not hold ''manager'' titles to perform this Sunday assignment and Respondent's reasons for claiming that Jennings is not qualified for Sunday manager on duty because he was not a manager is pretextual in nature. The continued denial of the opportunity to receive this Sunday assignment would not have occurred were it not for Respondent's improper removal of Jennings from a position as a manager and therefore I find in both instances that the General Counsel has met his overall burden of proof and I find that Respondent's removal of Jennings from his night manager position and the refusal of an opportunity to serve as Sunday manager on duty are shown to be unjustified and illegally motivated and a violation of Section 8(a)(3) of the Act, as alleged.

[3] It was not established if dollar amounts were discussed and it appears there could have been some misunderstanding regarding the ''hours'' referred to by the regular hour rate or if the ''premium'' pay was being considered.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Thomas H. Jennings was at all times material herein an employee within the meaning of Section 2(3) of the Act and was not a supervisor within the meaning of Section 2(11) of the Act.

3. By threatening employee Thomas H. Jennings with demotion and loss of overtime and by demoting him and refusing to assign him overtime work as Sunday manager on duty, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

4. By maintaining and selectively and disparately enforcing the posting provision and by specifically directing employees to remove union meeting literature, Respondent has violated Section 8(a)(1) of the Act.

5. By interfering with an employees grievance filing activities; telling an employee he would be or had been demoted because the employee filed a grievance asserting contractual seniority rights; threatening an employee with unspecified reprisal if the employee continued to discuss union activities with other employees; and implying to an employee he could no longer have every Saturday off because the employee filed grievances and engaged in union activity, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer to restore Jennings to his position as night manager and otherwise to allow him to fully exercise his seniority rights as an employee under the applicable collective-bargaining agreement and to make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him a sum of money equal to that which he normally would have earned had he not been demoted or been denied the opportunity to take advantage of his seniority rights or to otherwise be assigned as Sunday manager on duty in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Schnuck Markets, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by threatening any employee with demotion and/or loss of overtime; maintaining and selectively and disparately enforcing the posting provisions; directing employees to remove Union meeting literature; interfering with any employees' grievance filing activities; telling any employee he would be or had been demoted because the employee filed a grievance asserting contractual seniority rights; threatening any employee with unspecified reprisal if the employee continued to discuss union activities with other employees; and implying to any employee he can no longer have every Saturday off because the employee filed grievances and engaged in union activity.

(b) Demoting and/or refusing to assign any employee to entitled overtime work as Sunday manager on duty or otherwise discriminating against them because of his Union or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Make Thomas H. Jennings whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section above.

(b) Offer Thomas H. Jennings the opportunity to return to his former position as night manager and otherwise allow him to take advantage of his seniority rights under the collective-bargaining agreement, including appropriate assignments as Sunday manager on duty.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its St. Louis, Missouri division area facilities copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 14 after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notice is not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act by threatening our employee with demotion and/or loss of overtime; maintaining and selectively and disparately enforcing the posting provision of the contract; directing our employees to remove Union meeting literature; interfering with our employees' grievance filing activities; telling any employee that he would be or had been demoted because the employee filed a grievance asserting contractual seniority rights; threaten any employee with unspecified reprisal if the

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

employee continued to discuss union activities with other employees; and WE WILL NOT imply to any employee he can no longer have every Saturday off because the employee filed grievances and engaged in union activity.

WE WILL NOT demote and/or refuse to assign any employee to entitled overtime work as Sunday manager on duty or otherwise discriminate against him because of his Union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make Thomas H. Jennings whole for the losses he incurred as a result of the discrimination against him with interest.

WE WILL offer Thomas H. Jennings the opportunity to return to his former position as night manager and otherwise allow him to take advantage of his seniority rights under the collective-bargaining agreement, including appropriate assignments as Sunday manager on duty.

SCHNUCK MARKETS, INC.